146 U 856

RECORD, CASE NO. 15064.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO. 1094.

CHARLES C. HUBBARD, COLLECTOR OF CUSTOMS FOR THE DISTRICT OF HARTFORD, CONNECTICUT, PLAINTIFF IN ERROR,

vs.

CHARLES SOBY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

FILED JUNE 25, 1892.

"only to process: particularly such as is granted "specially. To sue out a writ is to *obtain and issue it*; "*to issue* it on leave obtained for the purpose."

It is respectfully submitted that the case should be dismissed for want of jurisdiction.

CHARLES B. WILBY,

GUSTAVUS H. WALD,

Attorneys for the Grand Rapids Safety Deposit Co.

See also
United States v. Baxter, 51 Fed. 324

146 U.S. 556

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1 Circuit court of the United States, district of Connecticut.

CHARLES SOBY
vs.
CHARLES C. HUBBARD, COLL'R.

To the honorable the judges of the circuit court of the United States for the second circuit and district of Connecticut:

The petition of the said Charles C. Hubbard, coll'r, defendant in the above-entitled action, respectfully represents that it is aggrieved by the final judgment rendered against him in the said action upon the docket of this court, and is informed that there is error therein to his prejudice, and he is desirous that a writ of error be allowed to him therefrom to such court as may have jurisdiction to review and reverse such judgment.

And whereas this petitioner is uncertain as to this matter he prays that writs of error be allowed to him, returnable both to the next term of the Supreme Court of the United States and to the next term of the United States circuit court of appeals for the second circuit.

Dated Hartford, June 11th, 1892.

CHAS. C. HUBBARD, *Collector,*
By GEO. P. MCLEAN,
U. S. Atty., Dist. of Conn.

And thereafter, upon the filing of said petition, there was issued out of said court a certain writ of error, a copy of which was filed in the clerk's office of the court, said writ being as follows, viz:

2 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the judges of the circuit court of the United States for the district of Connecticut, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you or some of you, between Charles Soby and Charles C. Hubbard, coll'r, a manifest error hath happened, to the great damage of the said Charles C. Hubbard, coll'r, as is said in and appears by said complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States at Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the sixth day of July next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct the error what of right and according to law and custom of the United States ought to be done.

Witness the honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 11th day of June, in the year of Our Lord one thousand eight hundred and ninety-two, and of the Independence of the United States the one hundred and seventeenth.

Clerk of the circuit court of the United States of America for the district of Connecticut.

[SEAL.] E. E. MARVIN,
Clerk, U. S. Circuit Court, District of Conn.

Allowed:

N. SHIPMAN,
One of the Judges of the Circuit Court of the United States for the District of Connecticut.

And on the same day a citation was issued out of said court to the defendant in error, which, with the return of service endorsed thereon, was and is as follows, viz:

3 UNITED STATES OF AMERICA, ss:

To Charles Soby, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, on the 6th day of July, A. D. 1892, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Connecticut, wherein Charles C. Hubbard, collector, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated at Hartford, June 11, 1892.

N. SHIPMAN,
U. S. Circuit Court Judge for the Second Circuit and District of Connecticut.

4 HARTFORD, *June* 17, '92.

DISTRICT OF CONNECTICUT,
Hartford County:

On said day I left with and in the hands of Charles Soby, the within-named defendant, a true and attested copy of the within.

Attest:

A. P. MOORE,
Dep. U. S. Marshal.

Fees—	
Service	$2.00
Travel	.12
Copy	.50
Endorsements	.30
	2.92

5 The return of the judges of the circuit court of the United States to the foregoing writ.

The record and proceedings whereof mention are therein made follow in these words, viz:

CHARLES SOBY
vs.
CHARLES C. HUBBARD, COLLECTOR. } No. 378. Law.

Be it remembered that on the 9th day of October, A. D. 1890, Chas. C. Hubbard, of Hartford, in the district of Connecticut, collector of customs duties for Connecticut district, was summoned to be and appear in the circuit court of the United States for the district of Connecticut, to be holden on the 4th Tuesday of April, 1891, at New Haven, in said district, then and there to answer unto a civil action pending in said court upon a certain complaint and writ on file in said court, which, with the return endorsed thereon, was and is as follows, viz:

6 UNITED STATES OF AMERICA,
District of Connecticut, ss:

The President of the United States to the marshal of the district of Connecticut, greeting:

We command you to summon Charles C. Hubbard, of Hartford, in said district, collector of customs of the United States for the district of Hartford, in the State of Connecticut, to appear before the circuit court of the United States to be holden at New Haven, within and for the district of Connecticut and the second circuit, on the 4th Tuesday of April, 1891, then and there to answer unto Charles Soby, of Hartford, in said district and State, in a civil action wherein the plaintiff complains and says:

First. The defendant was on the 14th day of June, 1890, and still is the collector of customs of the United States for the district of Hartford, in the State of Connecticut, duly appointed and qualified according to law.

Second. The plaintiff, Charles Soby, resides and does business in the city of Hartford, in said district, and on the 14th day of June, 1890, imported into the United States, and on the 19th day of the same month into the district of Hartford, 100 bales of leaf tobacco which had been raised in the island of Sumatra, and known by the name of Sumatra tobacco. Said tobacco was imported from Amsterdam, Holland, and

7 the entire weight of said 100 bales of tobacco was estimated by the United States appraiser at 17,217 pounds of tobacco, and duties were collected from the plaintiff upon the said number of pounds of tobacco.

Third. The following is a correct description of the importation referred to in the preceding paragraph: Description of goods, leaf tobacco; name of importer, Charles Soby; whence imported, Amsterdam; name of vessel, S. S. Amsterdam; date of entry, June 19th, 1890; date of liquidation, July 17th, 1890; number of entry, 254; bales numbered, 100; liquidated duty, $12,079.95.

Fourth. The plaintiff says that after the importation of said tobacco into Hartford, in the collection district aforesaid, the defendant, as collector of customs, proceeded to assess and liquidate the duties payable upon said tobacco, and did assess the duties thereon at the following rates, to wit, upon 15,135 pounds thereof a duty of 75 cents per pound, amounting to the sum of $11,351.25; upon 2,082 pounds a duty of 35 cents per pound, amounting to the sum of $728.70, and that the whole amount of duty assessed by the defendant upon said tobacco was $12,079.95, which sum was then and there exacted from the plaintiff by the defendant.

Fifth. The plaintiff avers that the defendant, as collector aforesaid, took into his possession all the tobacco imported by the plaintiff, as above described, and deposited the same in the warehouse of the United
8 States in said district, and held the same for the payment of the full amount of the duties assessed, as described in paragraph fourth.

Sixth. On the 22nd day of July, 1890, and within ten days after the ascertainment and liquidation of the duties imposed upon said tobacco, the plaintiff gave notice in writing to said defendant on the entry thereof of protest against the decision, assessment, and liquidation of duties thereon as made by the defendant, setting forth thereon distinctly and specifically the grounds of the plaintiff's objections thereto, and did also, within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury. A copy of the written protest and appeal, the original of which was duly served upon the defendant on the date last mentioned, is hereto annexed, marked Exhibit A, and made part of this compliant, as if fully set out herein; and the plaintiff protests against said assessment and liquidation of duties upon all the grounds and for all the reasons set forth in said Exhibit A.

Seventh. The plaintiff avers that the whole quantity of tobacco imported as aforesaid by the plaintiff was and is, in point of fact, below the grade in respect to which a duty of seventy-five cents a pound is prescribed by the act of March 3rd, 1883, Schedule F, in this, to wit, that the entire quantity of said tobacco thus imported was tobacco not stemmed, and of such weight that less than one hundred leaves are required to
9 weigh a pound; and further, that not eighty-five per cent of said tobacco, nor any part of it, is of the requisite size and of the necessary firmness of texture to be suitable for wrappers.

Eighth. The plaintiff avers that in fact less than eighty-five per cent of said tobacco is of the necessary fineness of texture to be suitable for wrappers; also that said tobacco was packed in hands of tobacco, and that less than eighty-five per cent of leaf in each hand was of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of such weight that more than one hundred leaves would be required to weigh a pound, and also that said tobacco was packed in bales, and that less than eighty-five per cent of the hands in each bale and also of the gross amount of the entire bale in each case was of the necessary fineness and size to be suitable for wrappers, and of weight requiring more than one hundred leaves to weigh a pound; further, that the entire invoice quantity of said tobacco consisted of 100 bales, and that in point of fact less than eighty-five per cent of the entire invoice quantity thereof was of the requisite size and fineness to be suitable for wrappers, and of the weight of which more than one hundred leaves are required to weigh a pound.

Ninth. That the respective rates of duty upon said tobacco were not assessed upon weights ascertained by weighing the same; that the provisions of section 2890 were not in fact complied with, and that the assessment of seventy-five cents per pound as aforesaid was not made upon
10 any actual quantity of tobacco ascertained by the United States weighers, but merely upon an estimate of such weight made by the United States appraiser.

Tenth. That in appraising and estimating the grade of said tobacco and in the examination thereof, the defendant collector, as aforesaid, did not comply with sections 2901 and 2939 of the Revised Statutes of the United States, in this, to wit: That he did not designate upon the invoice, at least one package thereof, and one package at least of every ten packages of said tobacco, and did not cause the same to be opened and appraised, nor ordered to the public stores for examination, nor had the Secretary of the Treasury, by special regulation, directed a less number of packages to be examined, and in fact no sufficient examination of said tobacco was made, in order to ascertain whether eighty-five per cent was of the requisite size and fineness of texture to be suitable for wrappers, nor whether eighty-five per cent of the same required more than one hundred leaves to weigh a pound.

Eleventh. On the day of July, 1890, and less than ninety days before the commencement of this suit, the Secretary of the Treasury decided the aforesaid appeal against the plaintiff, and sustained the liquidation and assessment of the duties upon said tobacco, which had been made by the defendant, and thereupon, afterward, on the 25th day of September, 1890, the plaintiff, acting under compulsion, and in order to obtain pos-
11 session of his goods paid under protest to the defendant, the sum of $12,079.95, exacted by the defendant as duties upon said tobacco. That at the time of such payment the plaintiff duly notified the defendant that he claimed said tobacco to be dutiable at only 35 cents per pound, and that the plaintiff paid all other higher rates only under compulsion, and in order to obtain possession of his goods, and that he, the plaintiff, did not relinquish any rights he may have to a refunding of the difference between the duties exacted of him and any less duty which may hereafter be adjudged the legal duty on said goods, and then and there protested against all illegal exactions of duty on said tobacco; and the plaintiff says that the difference between the amount of duty exacted of the plaintiff as aforesaid and a duty upon all said tobacco, computed at 35 cents per pound, is $6,054.00. The plaintiff brings this suit in order to ascertain the validity of the demand and payment of the duties aforesaid and to recover back any excess so paid, pursuant to section 3011 of the Revised Statutes, and the plaintiff avers that he has fully complied with section 2931 of said statutes and with all other laws of the United States relating to protest, appeal, and the commencement of suit in this cause.

The plaintiff claims $8,000 damages.

Charles Soby, of Hartford, [illegible]ognized in $140 to prosecute, &c.

Witness the honorab[illegible]lville W. Fuller, Chief Justice of the
12 Supreme Court of the [illegible]nited States, and the seal of the circuit court of the United States at Hartford, in the district of Connecticut, in the second district, this 7th day of October, A. D. 1890.

E. E. MARVIN, *Clerk.*

DISTRICT OF CONNECTICUT,
Hartford County:

HARTFORD, *Oct. 9th*, 1890.

Then, and by virtue hereof, I left in the hands of Charles C. Hubbard, the within-named defendant, in said town, a true and attested copy of the within.

Attest:

A. P. MOORE,
Deputy U. S. Marshal.

Travel, 1 mile.....	.06
Service.....	2.00
Copy	3.00
Endorsement..	.30
	$5.36

And on the same day Geo. G. Sill, esq., attorney of the United States, entered his appearance in said suit for the defendant.

On the 15th day of October, Exhibit AA, referred to in the said complaint, and made part thereof, was filed and is in the words and figures following, viz:

13 EXHIBIT A.

CHARLES SOBY
vs.
CHARLES C. HUBBARD, collector.

HARTFORD, CONN., *July 22nd*, 1890.

CHARLES C. HUBBARD,
Collector of Customs:

SIR: We hereby protest against your decision, assesment, and liquidation of duties as made by you in our importation below mentioned of certain leaf tobacco, not stemmed, upon the following grounds and upon each of them separately:

First. We protest against the estimate of quantity of the different grades of said tobacco, as made by the appraiser, and the assessment of 75 cents per pound as made by you, as unlawful and not in accordance with the provisions of Schedule F of the act of March 3d, 1883, claiming said tobacco to be dutiable under said provision at only 35 cents per pound, because eighty-five per cent of said tobacco is not of the requisite and of the necessary fineness to be suitable for wrappers and less than one hundred leaves are required to weigh a pound.

Second. We claim that in ascertaining the grade of the raw tobacco for the purpose of classification, the leaf should be taken as the unit of quantity, and that where less than eighty-five per cent of each leaf is of the necessary fineness of texture to be suitable for wrappers, then such leaf is dutiable at 35 cents per pound.

14 Third. We claim that in ascertaining the grade of said tobacco for the purpose of classification, the hand should be taken as the unit of quantity, and that where less than eighty-five per cent of the leaf

in the hand is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, of which less than one hundred leaves are required to weigh a pound, then said tobacco is dutiable at only 35 cents per pound, as provided in Schedule F of the act of 1883 (Par. 247), claiming said tobacco to be under said limit.

Fourth. That in ascertaining the grade of said tobacco for purpose of classification, the bale should be taken as the unit of quantity, and where the bale does not contain eighty-five per cent of hands of the necessary fineness and lightness as aforesaid, then the whole bale is dutiable at only 35 cents per pound, under Schedule F, act March 3d, 1883 (Par. 247).

Fifth. That in ascertaining grade of said tobacco for purpose of classification, the bale should be taken as the unit of quantity, and that where less than eighty-five per cent of the bale is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which less than one hundred leaves are required to weigh a pound, then such bale of tobacco is dutiable at only 35 cents per pound, as provided in Schedule F, act March 3d, 1883 (Par. 247) claiming said tobacco to be under such limit.

15 Sixth. That in ascertaining the grade of said tobacco for the purpose of classification, the invoice quantity should be taken as the unit of quantity, and that where less than eighty-five per cent of the invoice quantity is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which less than one hundred leaves are required to weigh a pound, then such invoice quantity of tobacco is dutiable at only 35 cents per pound, as provided in Schedule F (Par. 247) of act of March 3d, 1883, claiming said tobacco to be under such limit.

Seventh. That in the absence of actual weight ascertained in the legal manner said tobacco is chargeable under Schedule F, act of March 3d, 1883, at no more than 35 cents per pound, because eighty-five per cent of the U. S. weighers' return of said tobacco is not of the requisite size and necessary fineness of texture to be suitable for wrappers, and that less than one hundred leaves are required to weigh a pound.

Eighth. That if it be held that the leaf is the legal unit of quantity, then if there is not eighty-five per cent of any one leaf of the necessary fineness of texture and lightness as aforesaid, the whole bale is dutiable at no more than 35 cents per pound, and we claim said tobacco to be under such limit.

16 Ninth. That if it be held that the hand is the legal unit of quantity, then if there is not eighty-five per cent of hands which contain eighty-five per cent of leaf of the requisite size, texture, and lightness as aforesaid in a bale, the whole bale is dutiable at no more than 35 cents per pound, and we claim said tobacco to be under said limit.

Tenth. That if it be held that the bale is the legal unit of quantity, then if there is not eighty-five per cent of the bale in an invoice which contains eighty-five per cent of leaf of the requisite size, texture, and lightness, as aforesaid, the whole invoice quantity is dutiable at no more than 35 cents per pound, and we claim that said tobacco is under said limit.

Eleventh. We further claim that there has been no legal appraisal of said tobacco; that the provisions of section 2939, U. S. Revised Statutes, have not been complied with.

Twelfth. That the respective rates of duties have not been assessed upon weights legally ascertained, in that the provisions of section 2890, U. S. Revised Statutes, have not been complied with, the duty of 75 cents per pound having been made upon an estimated weight made by the U. S. appraiser, instead of upon the actual quantity ascertained by the U. S. weighers, as provided by law.

Thirteenth. That the "standard" grade of said tobacco, ascertained in accordance with commercial usage, is less than the limitation specified in Schedule F, act March 3d, 1883 (Par. 246), and is therefore dutiable at only 35 cents per pound as provided under Par. 247 of said schedule and act.

17

Fourteenth. We claim that the examination of the tobacco made by the examiner was not such an examination as was required by sections 2901 and 2939 of the Revised Statutes, or by any other law, or by the Secretary of the Treasury; that no sufficient examination of the tobacco was made to ascertain whether eight-five per cent was of the requisite size and fineness of texture to be suitable for wrappers; nor whether 85 per cent of it required more than 100 leaves to make a pound.

Fifteenth. We therefore give notice that we pay all other higher rates than is claimed above as legal rate, under compulsion, and to obtain possession of our goods; and we also give notice that we do not intend by this protest to relinquish or waive any right we may have to a refunding of the difference between the duty exacted of us and any less duty which may hereafter be adjudged the legal duty upon said goods, intending this protest to be made against the present duty charged upon said goods, claiming that said duty is not the legal duty to which said goods are chargeable, holding you and the Government responsible for all excess of duty exacted by you upon said goods above the legal duty and protesting against all illegal exactions of duty thereon, and thereby give notice that we intend this protest to apply to all future similar importations by us, and also intend the duplicate protest herewith submitted for transmission by you to the Secretary of the Treasury, under the rules of your office, to be an appeal to him from your decision and to likewise apply to all future similar importations by us.

18

Importation referred to in the foregoing protest and appeal.

Description of goods.....Leaf tobacco.
Name of importer .....Charles Soby.
Whence imported .....Amsterdam.
Name of vessel .... S. S. Amsterdam.
Date of entry.....June 19th, 1890.
Date of liquidation.....July 17th, 1890.
Number of entry .....254.
Bales numbered. .....100.
Liquidated duty.....$12,079.95.

CHARLES SOBY.

And at the said term of said court held at New Haven on the 4th Tuesday of April, A. D. 1891, the plaintiff, by Lewis E. Stanton, esq., appeared and the defendant by said Geo. G. Sill, esq., U. S. att'y also appeared, and the cause was continued to the ensuing term of said court.

And thereafter on the 20th day of June, 1891, the defendant, by its said attorney, filed this answer in court as follows, viz:

19 Circuit court of the United States for the district of Connecticut, April term, 1881.

CHARLES SOBY
vs.
CHAS. C. HUBBARD, COLLECTOR.

Answer.

Paragraphs 1, 2, 3, 4, 5, 6 are admitted.
Paragraphs 7 and 8 are denied.
Paragraphs 9 and 10 are also denied.
Paragraph 11 is admitted.
And said defendant puts himself upon the country, and the plaintiff doth the like.

GEORGE G. SILL,
Atty. for Deft.

And at the term of said court held at Hartford on the third Tuesday of September, A. D. 1891, the respective parties appeared by their attorneys aforesaid and filed waiver of a trial of the issues to the jury, as follows:

20 In the U. S. circuit court, district of Connecticut.

CHARLES SOBY
vs.
C. C. HUBBARD, COLL'R.

In this case a trial of the issue by a jury is expressly waived, and it is agreed that the court may find the facts and decide the case with the full force and effect of a verdict of the jury.

Plaintiff by

LEWIS E. STANTON,
Attorney.

Defendant by

GEORGE G. SILL,
U. S. Att'y.

And thereupon the plaintiff moved for a continuance of the hearing of said cause until the ensuing term of court, which motion was denied.

And thereafter at the same term of court, to wit, on the 6th day of January, A. D. 1892, the case was fully heard by the court, and upon said hearing the following bill of particulars was filed, viz:

21 Circuit court of the United States, district of Connecticut.

CHARLES SOBY,
vs.
CHARLES C. HUBBARD, COLLECTOR.

Bill of particulars.

Name of importers.	Description of goods.	Whence imported.	Name of vessel.	Date of invoice.	Date of entry at custom-house.	Amt. of duty illegally exacted.	Date of payment duties in excess.	Protest filed.	Date of appeal to Sec. of Treasury.	Date of Secretary's decision.
Charles Soby.	Leaf tobacco.	Amsterdam, Holland.	S. S. Amsterdam.	May 31, 1890	June 19, 1890	$6,054	1890, Sept. 8, $50 50; Sept. 24, $234.20; Sept. 25, $5,768.30; total excess, $6,054.00.	July 22, 1890	July 22, 1890	July 30, 1890

And thereafter, on the 27th day of January, A. D. 1892, the court filed its opinion and findings of facts in the matter as follows:

22 Circuit court of the United States for the district of Connecticut.

CHARLES SOBY
vs.
CHARLES C. HUBBARD, COLLECTOR.

SHIPMAN, J. This is an action at law by Charles Soby to recover from the collector of customs for the port of Hartford the duties which are claimed to have been illegally exacted, and which were paid under protest, upon a portion of an importation of Sumatra tobacco into said port, from Amsterdam, in June, 1890.

The parties, by written stipulation in writing and duly signed, waived a trial by jury, the cause was tried by the court, and the following facts are found to have been proved and to be true.

The plaintiff, Charles Soby, a citizen and resident of Connecticut, purchased of Schroeder & Bon one hundred bales of Sumatra unstemmed leaf tobacco, to be used for wrappers. The whole number of bales were upon their arrival in New York from Holland, in June, 1890, immediately transported, without appraisement, to the port of Hartford. The invoice consisted of two different plantation lots, one of forty-three bales from the "Lankat" plantation and one of fifty-seven bales from the "Senembah" plantation. The hands of tobacco had been properly packed in bales in the usual way in Sumatra, without fraud or attempt to deceive or to evade

the customs laws of this country, and had not been opened or repacked in Holland, and were all intended for wrappers. The tobacco in each separate lot was of uniform quality.

Upon the entry of the goods in Hartford the two plantation lots were separately examined, weighed, and appraised by the appraiser. Five bales of the "Lankat" lot and six bales of the "Senembah" lot were set apart, cut open, and ten hands were drawn from different parts of each bale. The hands from each bale were separately weighed, the weights were recorded, the leaves in each hand were separately counted, and the numbers were recorded. According to the table furnished by the appraiser in New York, and approved by the Treasury Department, all hands of tobacco weighing from 3 to 3 1-32 ounces and counting 18 leaves per hand are equal to 100 leaves per pound. All those weighing from 3 2-32 ounces to 3 6-32 ounces and counting 19 leaves to the hand equal 100 leaves to the hand equal 100 leaves to the pound. No examination as to size or fineness of texture was made. The examination was made strictly in accordance with instructions which were approved by the Treasury Department, and no compiaint is made of its accuracy or of the accuracy of its results.

There were 7,401 pounds in the "Lankat" lot, upon which the appraiser reported "leaf tobacco over 100 leaves per pound, 6,941 pounds, or 93 1-4 per cent, 75 cents per pound; and all other leaf tobacco 460 pounds, or 6 3-14 per cent, 35 cents per pound." There were 9,816 pounds in the "Senembah" lot upon which the appraiser reported "leaf tobacco over 100 leaves per pound 8,194 pounds, or 83 483-1009 per cent of all, at 75 cents per pound. All other leaf tobacco 1,622 pounds, or 16 526-1009 per cent of all, at 35 cents per pound."

23 The "Lankat" lot was withdrawn for transportation to New York, where the duty was paid, so that no question arises in this case in regard to that lot.

The collector returned on the warehouse entry "Senembah" (M. Y.) P. Fifty-seven bales wrapper tobacco.

Over 100 leaves per lb. 8,194 pounds, at 75 cents.

Not over 100 leaves per lb. 1,622 pounds at 35 cents.

A duty of seventy-five cents per pound was exacted and paid under protest upon 8,194 pounds to obtain possession of said goods, and a duty of 35 cents per pound was exacted and paid upon 1,622 pounds.

The plaintiff made due protest and appeal, and all the statutory prerequisites to the institution of a suit were duly complied with.

No evidence was offered upon the trial to show that the "Senembah" tobacco had more or less than 85 per cent of the requisite size and of the necessary fineness of texture to be suitable for wrappers.

The plaintiff offered some evidence to show that some of the leaves were torn or broken or worm eaten or rusty, but did not undertake to show that the percentage was more than 15 per cent. It was apparent that the percentage of inferior tobacco was quite small, but whether it was a trifle more or less than 15 per cent did not appear. The torn and broken leaves became so in transportation and by rubbing against the outside of the bale.

The question upon the foregoing facts are, whether the statute was correctly construed and whether the collector exacted the proper rate of duty. The tobacco was dutiable under section 6 of the act of March 3, 1883, c. 121 (22 Stat., 503), which is as follows: "Leaf tobacco, of which eighty-

five per cent is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound, if not stemmed, seventy-five cents per pound; if stemmed, one dollar per pound.

All other tobacco in leaf, unmanufactured, and not stemmed, thirty-five cents per pound."

This statute received, during its lifetime, various constructions from the officers whose duty it is to construe the customs revenue laws. It is not clearly expressed, and there were serious practical difficulties in the way of administering it, under any construction.

The first question is, whether the provision in regard to weight relates to the eighty-five per cent which is to be of the requisite size and texture, or whether the statute is to read, "Leaf tobacco, of which more than one hundred leaves are required to weigh a pound."

The latter construction has never apparently been favorably considered by the Treasury Department or by the Supreme Court. The statute means that leaf tobacco, not stemmed, which has in its unit of quantity, whatever that unit may be, eighty-five per cent of the requisite size, fineness, and weight, is dutiable at 75 per cent.

The next and most important question relates to the unit upon which the 85 per cent is to be calculated.

In Falk v. Robertson, 137 U. S., 225, there were in each bale two separate classes of tobacco, one "wrappers" and the other "fillers," and each class was separated from the other by strips of paper or cloth, so that when the bale was opened one class was readily separable from the other. The whole of the wrapper class was of the specified size, fineness, and weight.

The Supreme Court held that in such case the unit was not the bale, but was the separated quantity of the wrapper leaf of the specified description.

The facts in this case are very different from those in the Falk
24 case, but the idea which the court gives of the proper unit upon which calculations is to be made is also applicable to different states of fact.

The unit is the separable and separated quantity of leaf tobacco wrappers and substantially uniform grade. A whole invoice fairly packed and consisting of one grade or lot might be a proper unit. When the invoice consists of two or more separate lots of different grades it can not be the unit. When bales are falsely packed, or the tobacco is fraudulently admixed with "filler" tobacco, or two classes of tobacco are presented in one bale, the leaf tobacco in wrappers answering the statutory description in each bale is, as in the Falk case, properly the unit.

In this case, there were two separate lots; all the tobacco was for wrappers; the lot in question was of uniform grade, and there was no fraudulent admixture of inferior tobacco. I am of opinion that the proper unit was the quantity of tobacco in the "Senembah" lot.

The quantity contained a fraction over 83 per cent of the required weight. Whether it contained more or less of the requisite fineness and size is unknown. The instructions of the Treasury Department apparently proceeded upon the theory that the size and fineness would correspond with the weight, and, so far as the testimony in the case shows, I am not prepared to say that this theory is not a correct one.

The examination of the appraiser having shown that 83 per cent of the quantity had the statutory requisite as to weight, the collector exacted a duty of seventy centss per pound upon that percentage of the entire number of pounds and a duty of thirty-five cents per pound upon the rest of the tobacco. I am of opinion that the statute imposed a duty of 75 cents per pound upon the whole quantity, if 85 per cent thereof came up to the statutory standard, and of 35 cents per pound if 85 per cent was not reached. The rule under which the collector acted ignored the requirement of the statute in regard to 85 per cent. The statute does not say that a duty of 75 cents is imposed upon so much of the unit of calculation as reaches the required standard, and a duty of 35 cents upon the residue, but it says that the higher rate is imposed upon the whole quantity if 85 per cent thereof has the requisite description.

The statute did not contemplate that from a unit of uniform grade the portion of tobacco which was of the required standard was to be sorted out and considered as dutiable at 75 cents. If this is the correct theory—if a quantity of tobacco of uniform grade and honestly packed contains only ten per cent of the required standard and 90 per cent of inferior grade, the ten per cent is to pay 75 cents per pound.

Again, if the unit happened to be 100 pounds, 86 of which were of the requisite standard in the three particulars of size, fineness, and weight, the collector would, in accordance with this rule, exact 75 cents per pound upon 86 pounds and 35 cents per pound upon 14, whereas the statute requires a duty of 75 cents upon the whole 100 pounds.

Accordingly, the papers in the case show that the collector was about to collect upon 93 per cent of the "Lankat" lot a duty of 75 cents per pound, and a duty of 35 cents per pound upon the remaining, seven per cent, whereas, if 93 per cent conformed to the required standard, the entire quantity was dutiable at the larger rate.

The theory of the department is based upon those clauses in the decision in the Falk case which say that the duty of 75 cents per pound is imposed upon any quantity of unstemmed leaf tobacco of the specified quantity and weight. This language is to be read in the light of the peculiar facts of that case, and in connection with other language of the court which shows that emphasis was placed upon these facts. I do not think that it was the intention of the court to hold where leaf tobacco, designed and generally suitable for wrappers and of uniform grade, had been packed without fraud or false packing, that so much of the tobacco in the uniform lot as conformed to the requisite description, without any reference to the 85 per cent provision, was dutiable at 75 cents per pound, and the residue, whether more or less than 15 per cent of the entire quantity was dutiable at 35 cents per pound. Such a construction would create a new statute. The decision of Judge Wheeler, in the case entitled "In re Blumlein & Co.," which was recently tried in New York, accords with the views which I have expressed.

Let the judgment be entered for the plaintiff for the sum of $3,277.60 and costs, and let a certificate of probable cause also be entered.

Lewis E. Stanton and William Stanley, for the plaintiff.

George G. Sill, U. S. dist. att'y, for the defendant.

And on the 27th day of February, A. D. 1892, the court filed its further finding of facts and conclusions of law in the said matter, and also on the entered judgment in due form, and filed the same as follows, viz:

26 United States circuit court, district of Connecticut.

CHARLES SOBY
vs.
CHARLES C. HUBBARD, COLLECTOR.

This case coming on for trial at a circuit court of the United States for the district of Connecticut, before me, at Hartford, on the 6th day of January, 1892, and a stipulation in writing made by the attorneys of the respective parties waiving a jury having been duly filed with the clerk of this court, and a trial having been had, I find the following facts:

First. That plaintiff, Charles Soby, a resident of Connecticut, purchased from Schroeder & Bon, to arrive from Amsterdam, Holland, one hundred bales of Sumatra unstemmed leaf tobacco. That the whole number of bales was upon their arrival in New York from Holland, immediately transported without appraisement to the port of Hartford.

Second. That the invoice consisted of two plantation lots, one of forty-three bales from the Lankat plantation, and one of fifty-seven bales from the Senembah plantation.

Third. That the hands of the tobacco had been properly packed in bales in the usual way in Sumatra without fraud or attempt to deceive or evade the customs laws of this country, and had not been opened or repacked in Holland. The tobacco in each separate lot was of substantially uniform grade and quality, and of the class known in the trade as wrapper tobacco.

Fourth. That upon entry at Hartford the two plantation lots were separately examined, weighed, and appraised by the deputy collector of the port, acting as appraiser, the Lankat lot upon samples drawn from five bales of that plantation lot, but the duty was not paid at Hartford on that lot, the same having been reshipped in bond to New York. The "Senembah" plantation lot was appraised from samples drawn from six bales of that plantation lot. The collector exacted the sum of $3,277.60 as duties upon the Senembah lot in excess of 35 cents a pound, which sum plaintiff paid under protest in order to obtain possession of his goods. He filed his protest, appealed to the Secretary of the Treasury from the decision of the collector, and brought this suit and filed his bill of particulars, all in due time, to enable him to recover back the amount paid in excess of 35 cents per pound, if entitled by law so to do.

Fifth. That the appraisement was made as follows: Ten hands were drawn from each sample bale. The hands were separately weighed and their weights recorded, and the number of leaves in each separate hand counted and recorded. According to the table furnished by the appraiser in New York, and approved by the Treasury Department, all hands of tobacco weighing from 3 to $3\frac{1}{32}$ ounces and counting 18 leaves per hand, are equal to 100 leaves per pound. All those weighing from $3\frac{2}{32}$ ounces to $3\frac{6}{32}$ ounces and counting 19 leaves to the hand, equal 100 leaves to the

pound. No examination as to size or fineness of texture was made.
27 The examination was made strictly in accordance with instructions which were approved by the Treasury Department, and no complaint is made of its accuracy or of the accuracy of its results.

There were 7,401 pounds in the "Lankat" lot, upon which the appraiser reported, "Leaf tobacco over 100 leaves per pound, 6,941 pounds, or $93\frac{11}{14}$ per cent, 75 cents per pound; and all other leaf tobacco 460 pounds, or $6\frac{3}{14}$ per cent, 35 cents per pound." There were 9,816 pounds in the "Senembah" lot, upon which the appraiser reported, "Leaf tobacco over 100 leaves per pound, 8,194 pounds, or $83\frac{483}{1009}$ per cent of all, at 75 cents per pound. All other leaf tobacco, 1,622 pounds, or $16\frac{526}{1009}$ per cent of all, at 35 cents per pound." The "Lankat" lot was withdrawn for transportation to New York, where the duty was paid, so that no queston arises in this case in regard to that lot.

The collector returned on the warehouse entry "Senembah (M. Y.) P. Fifty seven bales wrapper tobacco."

Over 100 leaves per lb., 8,194 pounds at 75 cents.

Not over 100 leaves per lb., 1,622 pounds at 35 cents.

A duty of 75 cents per pound was exacted and paid under protest upon 8,194 pounds to obtain possession of said goods, and a duty of 35 cents per pound was exacted and paid upon 1,622 pounds.

Sixth. That no examination was made of the tobacco to ascertain whether or not 85 per cent of it was of a sufficient size of leaf or fineness of texture of leaf, to be suitable for wrappers, but the classification was determined by the number of leaves in the pound.

Seventh. No evidence was offered by either party in respect to the percentage of leaves that were of the requisite size and fineness of texture to be suitable for wrappers. The plaintiff offered some evidence to show that some leaves were torn or broken or worn eaten or rusty. The torn and broken leaves became so in transportation, and by rubbing against the side of the bale. The plaintiff did not undertake to show that the percentage of inferior tobacco was more than 15 per cent. The stems in all leaves are too coarse to be suitable for wrappers, and in each leaf the stem constitutes more than 15 per cent of the weight of the leaf, and these general facts are true in regard to this particular lot of tobacco.

Eighth. In the leaves of this tobacco which had the requisite size, texture, and weight to be suitable for wrappers, the stems were less than 2 per cent of the superficial area of the whole leaf, or in other words, the stems of this tobacco which had all the statutory requisites for wrappers, constituted less than 2 per cent of the area of such leaves. This is also a general rule applicable to all Sumatra wrapper tobacco.

I find as matter of law—

First. That the plaintiff is entitled to recover the amount paid by him in excess of 35 cents a pound, to wit, the sum of $3,277.60, with interest thereon to date, amounting to $3,555.15, together with his costs.

N. SHIPMAN,
District Judge.

28 Circuit court of the United States for the district of Connecticut.

CHARLES SOBY
vs.
CHARLES C. HUBBARD, COLLECTOR. } Judgment.

The above cause having been brought on for trial before the Hon. Nathaniel Shipman, judge of the United States district court for the district of Connecticut, on the 6th day of January, 1892, and a jury having been waived, and the cause tried and findings of law and fact filed herein, and judgment having been ordered for the plaintiff in the sum of $3,277.60, and the costs having been taxed in the sum of $50.11:

Now, on motion of Lewis E. Stanton, esq., attorney for plaintiff,

It is adjudged that the plaintiff, Charles Soby, have judgment against the defendant, Charles C. Hubbard, collector, in the sum of $3,277.60 damages and interest, making the sum of $3,555.15 and $50.11 costs.

Dated Hartford, February 27th, 1892.

N. SHIPMAN,
District Judge.

And on the 27th day of March, A. D. 1892, the court made its further certificate that the defendant had probable cause to require and collect the taxes which were the subject of the suit, which certificate is as follows, viz:

29 U. S. circuit court, district of Connecticut, Sept. 1, 1891.

CHARLES SOBY
vs.
CHARLES C. HUBBARD, COLLECTOR.

It is hereby certified that the defendant had probable cause to require the payment of the duties which he demanded and received from the plaintiff in the above suit, and that he acted under the direction of the Secretary of the Treasury in making such demand.

N. SHIPMAN,
Circuit Judge.

And on the 8th day of June, A. D. 1892, the defendant, by Geo. P. McLean, the attorney of the United States for the district of Connecticut, again appeared and prayed out writs of error, both to the Supreme Court of the United States and to the United States circuit court of appeals for the second circuit, and for errors the following assignment was filed, viz:

30 C. C. HUBBARD, COLL'R, PLAINTIFF IN error,
vs.
CHARLES SOBY, DEFENDANT IN ERROR.

Afterwards, to wit, on the eleventh day of June, A. D. 1892, before the justices of said court, at the city of Hartford, comes the plaintiff in error, by George P. McLean, the attorney of the United States within and for the district of Connecticut, and says that in the records and proceedings of said circuit court of the United States there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment in form afore-

said given was given for the said defendent in error against the plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff in error and against the said defendant, and for errors he assigns the following, to wit:

Assignment of errors.

1st. In that the court did not hold that so much of said tobacco as was suitable for wrappers should be dutiable for at 75 cents per lb., and all others at 35 cents per lb., but did hold it was all dutiable at 35 cents per lb.

2nd. In that it did not hold that the words "eighty-five per cent," as used in said statute, had reference solely to the superficial area of the leaves of tobacco which had the requisite size and necessary fineness to be suitable for wrappers, and not to the weight of the undivided leaf or any number of leaves, either in a bale or cargo.

3rd. In that it did not hold that the entire invoice of one hundred bales, having two plantation marks, should be treated as one invoice; and if the ten lots taken together had an average of at least 85 per cent suitable for wrappers, then the whole one hundred bales were dutiable at 75 cents per lb., notwithstanding forty-seven bales, having an average of 93 and 11-14 per cent suitable for wrappers, were withdrawn from the custom-house and returned to New York, where the duties were paid upon the appraisement made in Connecticut, leaving the 53 bales in controversy, having 83 and 483–1009 per cent, suitable for wrappers.

4th. In that the court it did not hold that the two plantation lots together made the unit upon which calculations of duties should have been made.

5th. In that the court it did not hold that the unit was the quantity of tobacco suitable for wrappers.

C. C. HUBBARD,
By GEO. P. MCLEAN,
U. S. Attorney, Dist. of Conn.

31 UNITED STATES OF AMERICA,
District of Connecticut, ss:

I, Edwin E. Marvin, clerk of the circuit court of the United States for the district of Connecticut, do certify that the foregoing is a true copy of the record and proceedings recorded and on file in my office in the case of Charles Soby versus Charles C. Hubbard, collector.

In testimony whereof, I have set hereto my hand and the seal of said court at Hartford, in said district, this 20th day of June, A. D. 1892.

[SEAL.] E. E. MARVIN,
Clerk.

(Indorsement on cover:) Case No. 15064. Term No. 1094. Charles C. Hubbard, collector of customs for the district of Hartford, Connecticut, plaintiff in error, vs. Charles Soby, Connecticut, C. C. U. S. Filed June 25th, 1892. Supreme Court U. S., clerk's office. Received Jun. 20, 1892.

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CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1892.

CHARLES C. HUBBARD, COLLECTOR, ETC.,
vs.
CHARLES SOBY.
No. 1094.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

ON A MOTION TO DISMISS.

BRIEF FOR THE PLAINTIFF IN ERROR.

Supreme Court of the United States.

OCTOBER TERM, 1892.

CHARLES C. HUBBARD, COLLECTOR, ETC.,
vs.
CHARLES SOBY. } No. 1094.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

ON A MOTION TO DISMISS.

BRIEF FOR THE PLAINTIFF IN ERROR.

This suit was brought by the defendant in error to recover an alleged excessive exaction of duty by the plaintiff in error upon a certain importation of leaf tobacco into the port of Hartford, Conn.

According to the bill of particulars (p. 10) the merchandise was entered at the custom-house on June 19, 1890. On July 22, 1890, the defendant in error filed his protest against so much of the collector's exaction as was claimed to be excessive, and *on the same day* appealed to the Secretary of the Treasury, and on the 30th of the same month

of July the Secretary sustained the collector's liquidation and assessment of duty.

Thereafter, to-wit, on October 9, 1890, this suit was brought.

It is respectfully submitted that this court has jurisdiction of this writ of error.

It would be an abuse of the patience of the court to cite the cases in which it has been held that the mere fact that the subject-matter of a prior special law falls within the language of a subsequent general law does not warrant the conclusion that the two laws are in collision and that the earlier is repealed by the later.

We rely on this well-established principle of construction to support the jurisdiction claimed for the court in this case.

It is, therefore, no impediment whatever to the argument in opposition to the motion to dismiss this writ of error that the act of March 3, 1891, establishing circuit courts of appeals, confers on the said courts a final appellate jurisdiction "in all cases arising * * * under the revenue laws."

The language of the act of March 3, 1891, is, it may be conceded, broad enough to embrace the case at bar; but the question that arises in this case, and that arose in the many cases in which the above-mentioned principle of construction has been applied, is whether the legislative intent is coextensive with the generality of the language of the statute, for it is the intent, and not necessarily the literal sense of the words, that must prevail.

It will be remembered that the *customs administrative*

act of June 10, 1890 (26 Stat., 131; Supp. Rev. Stat., 2 ed., pp. 744, etc.), established an entirely new procedure for the review of the acts of collectors of customs in assessing duties on importations.

In the room of the preëxisting method of protest and appeal to the Secretary of the Treasury, and, in case of affirmance of the collector's action, suit against the latter to recover back what was claimed to have been illegally exacted by him, the new law provides boards of general appraisers, with jurisdiction to hear and decide appeals from the collectors' decisions as to the rate of duty assessable on importations, with the right to either party aggrieved by the decision of said boards to bring the case, by way of appeal, before the proper circuit court, and, in addition, provides for the allowance of appeals from the decisions of the circuit courts to the Supreme Court of the United States.

But as the act of June 10, 1890, did not go into effect until August 1, 1890, except as to the provision for the appointment of nine general appraisers, it was necessary to make provision for rights that had accrued and proceedings that had been commenced under the old laws prior to August 1, 1890, and, accordingly, it was provided as an exception to the repealing Section 29, as follows:

> * * * But the repeal of existing laws or modifications thereof embraced in this act shall not affect any act done, *or any right accruing or accrued, or any suit or proceeding had or commenced, in any civil cause before the said repeal or modifications; but all rights and liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modifications had not been made.* Any offenses committed, and all penalties or forfeitures or liabilities incurred, prior to the passage of this act, under any statute embraced in or changed, modified, or repealed by this act, may be prosecuted or punished in the same manner and with the same effect as if this act had not been passed. All acts of limitation,

> whether applicable to civil causes and proceedings or to the prosecution of offenses, or for the recovery of penalties or forfeitures embraced in or modified, changed, or repealed by this act, shall not be affected thereby; and all suits, proceedings, or prosecutions, whether civil or criminal, for causes arising or acts done or committed prior to the passage of this act, may be commenced and prosecuted within the same time and with the same effect as if this act had not been passed. * * *

It would seem clear that the right of the importer, Soby, to contest the collector's final liquidation of duty in July, 1890, was a right that accrued under the *old* law, and if a right that had accrued under the old law, then it was a right which the saving clause says "*Shall continue and* MAY BE ENFORCED IN THE SAME MANNER *as if said repeal or modifications had not been made.*"

The same clause also says that no right which has accrued under the old law *shall be affected* by the new law.

It further declares that the new law shall not *affect* "any suit or proceeding had or commenced in any civil cause before the said repeal or modifications."

If, now, the importer's right to contest the collector's liquidation of duty accrued under the old law and was to be enforced under that law, it follows, necessarily, that the collector's correlative right of defense must be exerted under the same law, and that the whole litigation between the two parties must be carried on through all the courts *precisely as though the act of 1890 had never existed.*

Again, the saving clause of the act of 1890 declares that no suit or proceedings under the former law in any civil cause shall be *affected* by the act. If, then, the importer's appeal to the Secretary of the Treasury of July 22, 1890, was not a suit, it would seem to have been a proceeding

in a civil cause, for surely the appeal to the Secretary was a necessary step or proceeding in the remedy provided for the aggrieved importer by sections 2931 and 3011 of the Revised Statutes, the whole remedy provided by those sections being entire.

If, then, the proceeding by way of appeal to the Secretary was not to be *affected*, we may reasonably conclude that Congress meant that the remedy thus initiated was to be undisturbed in all its after steps and stages. To be a proceeding unaffected by the new law, it must be treated as a proceeding wholly under the old law.

It must be conceded, and seems to be admitted in the opposite brief (p. 5), that if the act of March 3, 1891, had not been passed this writ of error would have been valid.

We proceed now to show that section 6 of the act of March 3, 1891, conferring on the circuit courts of appeals jurisdiction in revenue cases, can not be construed to have repealed the provisions of the saving clause in the act of 1890 in favor of rights and proceedings existing under the old law when the act of 1890 went into operation.

It cannot be reasonably supposed that Congress, in enacting the general legislation of the act of March 3, 1891, had in view this merely ephemeral saving clause of the act of 1890.

The case of *Ex parte Crow Dog* (109 U. S., 556) is a direct authority against the augument supporting the theory that the saving clause of the act of 1890 is affected by the act of March 3, 1891. Mr. Justice Matthews, in his masterly opinion in that case, adopts the law laid down by Chief Justice Bovill in *Thorpe* v. *Adams* (L. R., 6 C. P.,

135), and Vice-Chancellor Wood, in *Fitzgerald* v. *Champenys* (30 L. J., N. S. Eq., 782; 2 Johns & Hem., 31–54).

"The general principle to be applied," said the Chief Justice, "to the construction of acts of Parliament is, that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together."

"And the reason is," said the vice-chancellor, "that the legislature having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend, by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do." And, said Mr. Justice Matthews, in the case of Crow Dog, "the rule is, *generalia specialibus non derogant*" (p. 570.)

In *State* v. *Stoll* (17 Wall., 531) the court say:

> The provisions of a special charter or a special authority derived from the legislature are not affected by general legislation on the subject. The two are to be deemed to stand together; one as the general law of the land, the other as the law of the particular case (p. 436).

In *Brown* v. *County Commissioners* (21 Pa. St., 37, 43) the court uses language which is particularly apposite to this case. They say:

> It is against reason to suppose that the legislature, in framing a general system for the State, intended to repeal a special act which the local circumstances of one county had made necessary.

See also *Rounds* v. *Waymart Borough* (81 Pa. St., 395), a very strong case, and *Blain* v. *Bailey* (25 Ind., 165), *Ellis* v. *Botts* (26 Texas, 703), Sdgw. Con. and Stat. L.,

123, 124; Endlich, Stat., §§ 226, 227; Sutherland, Stat., § 157; *U. S.* v. *Mooney* (116 U. S., 104).

The rule now invoked has been frequently applied in revenue cases. There is quite a number of them in which it has been held that an article on which a duty is imposed by specific language, which can be applied to nothing else, is not embraced by the general terms of a law which would otherwise include it (see a cluster of cases in 96 U. S., pp. 108, 112, 118, 124, 125, 135, 143, and 1 Wall., 486), and hence in *Reiche* v. *Smythe* (13 Wall., 162) singing birds were held not to be covered by the general term animals, and in *Arthur* v. *Stephani* (96 U. S., 125) chocolate, put up as confectionery, was held not to be embraced by that term.

It is not *all* revenue cases that are claimed to be withdrawn from the operation of section 6 of the courts of appeals act, but a special limited class that *must soon cease to exist*, and, therefore, soon cease to trouble this court. It is no argument to say that, if a few special revenue cases are held to be excepted by the saving clause of the act of 1890 from the operation of section 6, therefore all patent cases must be excepted likewise, the cases being widely distinct.

The general provision of the old law as to appeals in all patent cases is necessarily swept away by the general provision of like import in the new law. So the *general* provision of the old law as to appeals in revenue cases is swept away by the provision of like import in the new law. But the *special* provision of the saving clause of the act of 1890 is unaffected by the new law, as we contend.

The same argument that we have applied to section 6 is applicable to the supplemental act of March 3, 1891 (26 Stat., 1115). The latter, no more than the former, affects previous special legislation.

If our view is correct, the case of *Lau Ou Bew* (144 U. S., 56, 57) has no relevancy whatever to this discussion, because the court in that case confined itself entirely to the effect of the courts of appeals act on conflicting anterior legislation of a general character.

There was nothing in the case to call the attention of the court to anterior *special* legislation. It stands to reason, besides, that the words "unless otherwise provided by law," as used in the courts of appeals act, could have no application to anterior legislation of a special limited character if such legislation was not within the purview of the act in which those words occur, as we contend is the case. In the same way the decision attributed to Judge Jackson in the opposite brief may be disposed of.

There is another reason why we should conclude that Congress did not intend to change the appellate jurisdiction over this special class of revenue cases, and that is, the omission of Congress to make any provision for adapting cases already instituted under the old law to the *widely different procedure* of the new law.

For example, how could a case at law, instituted under section 3011, Revised Statutes, be taken up to a circuit court of appeals ON APPEAL with no evidence in the record? The absence of anything in the act of March 3, 1891, to prevent such repugnancies and incongruities in

procedure is very cogent to show that Congress did not understand that an occasion for such legislation existed.

It is submitted therefore, with great respect, that the motion to dismiss this writ of error ought not to prevail.

WM. A. MAURY.

Assistant Attorney-General.

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CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 1094.

CHARLES C. HUBBARD, Collector, &c.,
Plaintiff in Error,

vs.

CHARLES SOBY,
Defendant in Error, (original Plaintiff).

MOTION TO DISMISS,

AND

BRIEF IN SUPPORT OF MOTION.

LEWIS E. STANTON,
EDWIN B. SMITH,
Of Counsel for Defendant in Error.

C. G. Burgoyne, Walker and Centre Sts., N. Y.

C. G. Burgoyne, Walker and Centre Sts., N. Y.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

CHARLES C. HUBBARD, Collector, &c., plaintiff in error, vs. CHARLES SOBY, defendant in error, (original plaintiff).	No. 1094.

Motion to Dismiss.

CHARLES SOBY, defendant in the cause above-entitled, moves the court to dismiss the writ of error therein, for want of jurisdiction in this court to hear and determine the same.

This is a suit between two citizens of Connecticut, brought October 9, 1890, in the Circuit Court of the United States for the district of Connecticut by said Charles Soby against said Charles C. Hubbard, to recover an alleged excess of duties upon imports exacted by said Hubbard, in his capacity of collector of customs of the port of Hartford, from said Charles Soby; the jurisdiction of said Circuit Court being entirely dependent upon the federal question thus arising under the customs-revenue laws of the United States. The Circuit Court found the exaction to be illegal, and gave judgment for the plaintiff below, defendant in error here, on the 27th day of February, 1892. Thereupon, on the 11th day of June, 1892, the present plaintiff in

error sued out the writ of error which brings the proceedings here.

Inasmuch as, under the sixth section of the act of March 3, 1891, (26 Stats. 828) no writ of error to this Court lies to such final judgment of said Circuit Court, the said defendant in error now moves that said writ be dismissed with costs.

LEWIS E. STANTON,
EDWIN B. SMITH,
Of counsel for defendant in error.

TO THE ATTORNEY-GENERAL OF THE UNITED STATES:—

You will please take notice that the motion of which the foregoing is a copy will be made and presented to the Supreme Court of the United States, at its ensuing term, on the seventeenth day of October, A. D. 1892, or so soon thereafter as counsel can be heard; and it will be supported by the subjoined brief.

Hartford, September 19th, 1892.

LEWIS E. STANTON,
EDWIN B. SMITH,
Of counsel for Charles Soby.

Brief in Support of Motion.

This case is not one of those enumerated in the fifth section of the act of March 3, 1891, c. 517, in which writs of error can be taken direct to the Supreme Court from the Circuit Courts. (26 Stats. 827–8.)

The sixth section of that act provides that

"The Circuit Courts of Appeals established by this act shall exercise appellate jurisdiction to review by appeal or writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, *unless otherwise provided by law*, and the judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, *under the revenue laws*, and under the criminal laws and in admiralty cases, excepting," etc.

The exception relates entirely to the right in that court to certify legal questions for instructions, etc. *(Id.)*

I.

This is a case arising "under the revenue laws" of the United States.

Pettigrew vs. U. S. 97 U. S. 386.

As such, it is one of those over which the new Circuit Court of Appeals alone is to exercise appellate jurisdiction by writ of error; and as to which its judgment

is to be final, unless it certify some legal question to the Supreme Court; or unless the whole record is removed here by *certiorari*, or some equivalent process of this Court. *(Id.)*

This act "went into immediate operation," upon its approval.

In re Claasen, 140 U. S. 204 bot.

The mischief experienced would not be remedied by any construction permitting the present writ. The purpose was "to facilitate the prompt disposition of cases in the Supreme Court" by relieving it of the enormous overburden of suits and cases.

McLish vs. Roff, 141 U. S. 666.
Lau Ou Bew vs. U. S. 144 *Id.* 55 bot.

In the last-cited case, this Court declared that, by sections 5 and 6 of this act,

"The appellate jurisdiction not vested in this Court [sec. 5] was thus [sec. 6] vested in the Court created by the act, and *the entire jurisdiction distributed.*" 144 U. S. 55 bot.

This decision settles the whole question here involved.

II.

It is understood the Attorney-General sues out this writ of error relying upon the phrase in § 6 "*unless otherwise provided by law*"; claiming customs-refund suits to be otherwise provided for by antecedent legislation.

Such construction makes this section and, substantially, the whole act *felo de se.* It cuts its own throat.

A Bangor merchant once devoted an entire letter to his Baltimore correspondent to elaborate instructions, directing a purchase of corn; to be sound, yellow, of this year's growth, not above a limited price, and to be shipped by a designated vessel. He then added this postscript before mailing;—"P. S. You needn't buy that corn."

Congress had no purpose of imitating this performance.

It is suggested by the Attorney General as a reason why this act does not apply to this case that, in the administrative tariff act of June 10th, 1890 (26 Statutes 131, Section 29) there is a saving clause connected with the repeal of Section 3011 of the Revised Statutes.

This saving clause in substance provides that suits and proceedings under former laws may go forward in the same manner as if *the act of June, 1890*, had not been passed.

If an importer had brought his suit in the Circuit Court he need not appeal to the Board of General Appraisers, or from them to the Circuit Court, but his existing suit should proceed, *unaffected by the administrative tariff act of 1890.*

But there is nothing in all this, which, as it seems to us, touches the present question.

In 1891, Congress passed a new act, relating to the entire subject of writs of error and appeal. The act created new courts of appeal. The primary object of it was (as already noted) to afford relief to the Supreme Court. It withdraws from the Supreme Court jurisdiction over appeals and writs of error in cases arising under the revenue laws, by giving the same jurisdiction to another tribunal.

The sixth section, above cited, from the Circuit Court of Appeals Act, declares that the judgment of the newly created tribunal, shall be final in all cases, in which the jurisdiction is dependent upon the opposite parties and their citizenship, and in all cases aris-

ing under the patent laws, revenue laws, and in admiralty cases.

Upon what theory can revenue cases be excepted from this list, and the jurisdiction over appeals and writs of error in such cases be thrown upon the Supreme Court of the United States? The very object of the new act was to create a new tribunal which should take this jurisdiction.

If revenue cases can be brought into the Supreme Court by appeal or writ of error, why not patent cases, criminal cases and admiralty cases?

It is to be observed that the repealing clause contained in the Circuit Court of Appeals Act, Section 14, is very broad, and no saving clause is included in it. (26 Stats. 829, 830.)

"And all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeal or writs of error in the preceding sections five and six of this act, are hereby repealed." *(Ib.)*

In a later act of same date (26 Statutes at Large, 1115) it is provided as follows:

"That nothing in said act [Circuit Court of Appeals Act] shall be held or construed in any wise to impair the jurisdiction of the Supreme Court, or any Circuit Court, of the United States in any case *now* pending before it, or in respect of any case wherein the writ of error or the appeal shall have been sued out or taken to any of said courts *before* the first day of July, anno domini, eighteen hundred and ninety-one. (March 3, 1891; 26 Stats. 1115)."

But this writ of error was prayed out in June, 1892, and the section last quoted appears to be the only saving clause which relates to the Circuit Court of Appeals Act.

We submit that the language of the repealing clause

above cited is decisive, and shows that all cases arising under the revenue laws are subject to the provisions of the Act creating the Circuit Court of Appeals, and that only the latter tribunal has jurisdiction of a writ of error in the present cause.

Not to extend this brief too far, by a comparison of each subject of jurisdiction, we will simply observe that the Attorney-General's theory is just as applicable to patent as to revenue causes. If a writ of error to this court lies in the one instance, it will in the other.

Not to go behind the reproduction of earlier laws in the revision, Revised Statutes, section 629, clause 'Ninth,' gives Circuit Courts jurisdiction "of all suits at law or in equity arising under the patent or copyright laws of the United States." Sections 691 and 692 of the Revised Statutes give a writ of error in all actions at law, and an appeal in equity causes, to this court from all final judgments and decrees of the Circuit Courts, above a prescribed amount. These are provisions of law for appeals in patent suits other than any contained in the sixth section of the act of March 3, 1891, chap. 517.

Revised Statutes, sections 2931 and 3011, provide for a recovery by suit of any illegal exaction of duties; the 'Fourth' clause of section 629 gives the circuit courts jurisdiction of all suits at law or in equity arising under any act providing for revenue from imports, &c.; while clause 'Third' of section 699 gives a writ of error to review the judgment of any circuit court for the recovery of any money, paid into the Treasury, which has been exacted by or paid to any officer of the revenue, etc. These are no more provisions of law other than those found in the act of March 3, 1891, than are those relating to the bringing up here of patent causes.

True, the act of June 10, 1890, § 29, in changing the method of an importer's obtaining refund from the U. S. Treasury of duties illegally exacted, declares the

change effected *by that act* shall not apply to nor affect suits or proceedings "for *causes* arising, or *acts done* or committed, prior to the passage of *this* act;" but such suits, etc., are still to "be commenced and prosecuted within the same time and with the same effect as if *this* act had not been passed." (26 Stats. 142.)

Accept, if you please, the Attorney-General's assumption, that *this statute of 1890* does not affect the rights or procedure of either party to this litigation;—this merely leaves the right and remedy to be governed by the Revised Statutes, and only emphasizes our preceding remarks, that the claim to a writ of error in this case is no different from or better than would be one for a writ in a patent cause.

The before-cited opinion of this Court anticipates and refutes the argument now made by the Attorney-General;—

> The words "unless otherwise provided by law" were manifestly inserted out of abundant caution, in order that any qualification of the jurisdiction by *contemporaneous* or *subsequent* acts should not be construed as taking it away except when expressly so provided. Implied repeals were intended to be thereby guarded against. *To hold that the words referred to prior laws would defeat the purpose of the act and be inconsistent with its context and its repealing clause.*
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> 144 U. S. Reps. 56–57.

This brief is in accordance with the conclusive reasoning of the opinion (*per* JACKSON, C. J.) in Part 7 of the Circuit Court of Appeals Reports (May 1, 1892) Sixth Circuit, middle of page 58; that the construction now contended for would deprive the Circuit Court of Appeals of *all* jurisdiction, "because when the act of March 3, 1891, was passed, *all* appeals and writs of error were 'otherwise provided' by law."

Louisville vs. Surveyor, *ubi sup.*

The *date* of such prior provision, or the subject to which it relates, cannot be material.

III.

If our motion to dismiss prevail, we are entitled to our costs in making it.

Bradstreet v. Higgins, 114 U. S., 262.

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